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U.S. Supreme Court U. S.
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No. [REDACTED]

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In the Supreme Court of the United States

OCTOBER TERM, 1937

GUY T. HELYHUNG, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

v.

ROBERT C. WINMILL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

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(I)

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The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on December 13, 1937, reversing in part a decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 17-32) is reported in 35 B. T. A. 804. The opinion of the Circuit Court of Appeals is reported in 93 F. (2d) 494.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 13, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a taxpayer who is engaged in the business of buying and selling securities for his own account may deduct, as an ordinary and necessary business expense, brokerage commissions paid in the purchase of the securities, or whether such commissions represent a part of the cost of the securities.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *

* * * * *

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 282. *Capital expenditures*.—Amounts paid for increasing the capital value or for making good the depreciation (for which a deduction has been made) of property are

not deductible from gross income. (See section 23 (k) and article 201.) Amounts expended for securing a copyright and plates, which remain the property of the person making the payments, are investments of capital. The cost of defending or perfecting title to property constitutes a part of the cost of the property and is not a deductible expense. The amount expended for architects' services is part of the cost of the building. Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities, when such commissions are not an ordinary and necessary business expense, are an offset against the selling price. * * *

STATEMENT

During the year 1932, the respondent operated three separate securities trading accounts (R. 19). During that year he paid, as brokerage commissions in the purchase of securities, the sum of \$7,493.50 (R. 20). He also operated jointly with other persons four securities trading accounts. His share of the buying commissions paid by these joint ventures in 1932 was \$270 (R. 20). He contends that these amounts are deductible as an ordinary and necessary business expense. The Commissioner of Internal Revenue determined that such commissions represented a part of the cost of the securities, and his action was affirmed by the Board of Tax Appeals (R. 29). Upon appeal, the Circuit Court of Appeals reversed and

remanded the cause with instructions to allow the commissions as an ordinary and necessary business expense, in the event the Board should find that the taxpayer was engaged in the business of buying and selling securities (R. 72).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that a taxpayer engaged in the business of buying and selling securities for his own account is entitled to deduct from gross income, as an ordinary and necessary business expense, brokerage commissions paid in the purchase of securities.

2. In failing to hold that brokerage commissions paid in the purchase of securities represent a part of the cost of such securities.

3. In reversing in part the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals holding that a taxpayer engaged in the business of buying and selling securities for his own account is entitled to deduct, as an ordinary and necessary business expense, the brokerage commissions paid in the purchase of securities is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Hutton v. Commissioner*, 39 F. (2d) 459. In that case a taxpayer engaged in the business of "buying, holding, and selling realties, securities, etc.",

sought to deduct, as an ordinary and necessary business expense, brokerage commissions paid upon the purchase of certain securities. The court held, however, that such expenditures represented a part of the cost price of the securities and denied the deduction. In the instant case, under identical facts, the court held that the commissions were deductible.

2. The decision of the court below is inconsistent with decisions in analogous circumstances, such as its prior decision in *Benwit Teller & Co. v. Commissioner*, 53 F. (2d) 381, certiorari denied, 284 U. S. 690, where it was held that commissions paid to secure a lease should be capitalized and deducted ratably over the life of the lease. The court in that case likened the commissions to a fee paid a broker for negotiating an annuity contract, and stated (p. 384) that such a fee "would pretty clearly be a capital expenditure to be added to the cost of the annuity rather than a business expense for the year when paid". To the same effect *Meyran v. Commissioner*, 63 F. (2d) 986 (C. C. A. 3d), and *Commissioner v. Chicago Dock & Canal Co.*, 84 F. (2d) 288 (C. C. A. 7th), holding that brokerage commissions paid for negotiating a lease are not to be treated as business expenses, even though, in the latter case, the business of the taxpayer was solely the making of leases.

3. The decision of the court below overturns the long established administrative practice of the Bureau of Internal Revenue with respect to the

handling of commissions paid upon the purchase of securities. The Treasury Regulations, beginning with those issued under the Revenue Act of 1916, have always provided that such commissions were not deductible as an expense, but were to be treated as part of the cost of the securities.¹ This long continued administrative construction may be deemed to have received legislative approval. *Brewster v. Gage*, 280 U. S. 327; *United States v. Dakota-Montana Oil Co.*, 288 U. S. 459.

Moreover, the regulations were tacitly approved by this Court in *Helvering v. Union Pacific Co.*, 293 U. S. 282. In holding that commissions paid by a taxpayer for the sale of its own bonds were not deductible as ordinary and necessary expenses, this Court there said (p. 286):

In this respect the commissions do not differ from brokerage commissions paid upon the purchase or sale of property. The regulations have consistently treated such commissions, not as items of current expense, but as additions to the cost of the property or deductions from the proceeds of sale, in arriving at net capital profit or loss for purposes of computing the tax.

¹ See Par. 108, Treasury Regulations 33 (1916); Art. 293, Treasury Regulations 45 (1918); Art. 293, Treasury Regulations 62 (1921); Art. 292, Treasury Regulations 65 (1924); Art. 292, Treasury Regulations 69 (1926); Art. 282, Treasury Regulations 74 (1928); Art. 282, Treasury Regulations 77 (1932); Art. 24-2, Treasury Regulations 86 (1934); Art. 24-2, Treasury Regulations 94 (1936).

This Court cited the successive Regulations (293 U. S. at 286 note), including Article 282 of Regulations 77, which the court below declined to apply.

4. The enactment of Section 23 (r) of the Revenue Act of 1932, limiting deductions for non-capital losses to the amount of non-capital gains for the same year, does not militate against what has already been said. The court below pointed out that in view of Section 23 (r) a taxpayer might lose the benefit of any deduction for buying commissions with respect to securities if the commissions are required to be treated as items of cost reflected in gain or loss in the year of disposition rather than as a business expense in the year of acquisition. But even under prior revenue acts, in the absence of Section 23 (r), such treatment of buying commissions entailed a similar possibility, for if the securities were sold at a loss and no taxable income existed against which the loss might be taken in the year of sale, the commissions would serve no function in reducing taxable income, whereas they might have done so had they been treated as a business expense in the year of acquisition of the securities. The hazard is increased by virtue of Section 23 (r), but a hazard existed under the prior Acts. The regulations dealing with buying commissions have remained unchanged, and for the reasons indicated it is submitted that there was no necessity for change. The unwillingness of the court below to apply the provision of the reg-

ulations applicable in terms suggests, in any event, that the case is an appropriate one for review by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition should be granted.

ROBERT H. JACKSON,
Solicitor General.

MARCH, 1938